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October 25, 2004

DEPARTMENT OF ENERGY
OFFICE OF HEARINGS AND APPEALS

Appeal

Name of Case: Worker Appeal

Date of Filing: June 28, 2004

Case No.: TIA-0122

XXXXXXXXXXXXXXXXXXXXX (the applicant) applied to the Department of Energy (DOE) Office of Worker Advocacy for assistance in filing for state workers' compensation benefits based on his employment at Bendix Corporation (Bendix) and Rust GeoTech, Inc. (GeoTech) in Grand Junction, Colorado. The DOE Office of Worker Advocacy determined that the applicant was not a DOE contractor employee under the regulations at issue here and, therefore, was not eligible for DOE assistance. The applicant appeals that determination. As explained below, we have concluded that the Office of Worker Advocacy erred in its determination and have remanded the case to that office for appropriate processing.

I. Background

The Energy Employees Occupational Illness Compensation Program Act of 2000 as amended (the EEOICPA or the Act) concerns workers involved in various ways with the nation's atomic weapons program. *See* 42 U.S.C. §§ 7384, 7385. The Act creates two programs for workers.

The Department of Labor (DOL) administers the first EEOICPA program, which provides federal monetary and medical benefits to workers having radiation-induced cancer, beryllium illness, or silicosis. Eligible workers include DOE employees, DOE contractor employees, as well as workers at an "atomic weapons employer facility" in the case of radiation-induced cancer, and workers at a "beryllium vendor" in the case of beryllium illness. *See* 42 U.S.C. § 73841(1). The DOL program also provides federal monetary and medical benefits for uranium workers who receive a benefit from a program administered by the Department of Justice (DOJ) under the Radiation Exposure Compensation Act (RECA) as amended, 42 U.S.C. § 2210 note. *See* 42 U.S.C. § 7384u.

The DOE administers the second EEOICPA program, which does not provide for monetary or medical benefits. Instead, the DOE program provides for an independent physician panel assessment of whether a "Department of Energy contractor employee" has an illness related to exposure to a toxic substance at a DOE facility. 42 U.S.C. §

7385o. In general, if a physician panel issues a determination favorable to the employee, the DOE instructs the DOE contractor not to contest a claim for state workers' compensation benefits unless required by law to do so, and the DOE does not reimburse the contractor for any costs that it incurs if it contests the claim. 42 U.S.C. § 7385o(e)(3).

The DOE program is specifically limited to DOE contractor employees¹ who worked at DOE facilities.² The reason is that the DOE would not be involved in state workers' compensation proceedings involving other employers.

The regulations for the DOE program are referred to as the Physician Panel Rule and are set forth at 10 C.F.R. Part 852. The DOE Office of Worker Advocacy is responsible for this program and has a web site that provides extensive information concerning the program.³

Pursuant to an Executive Order,⁴ the DOE has published a list of facilities covered by the DOL and DOE programs, and the DOE has designated next to each facility whether it falls within the EEOICPA's definition of "atomic weapons employer facility," "beryllium vendor," or "Department of Energy facility." 69 Fed. Reg. 51,825 (August 23, 2004) (current list of facilities). The DOE's published list also refers readers to the DOE Worker Advocacy Office web site for additional information about the facilities. 69 Fed. Reg. 51,825.

II. The Appeal

This case involves the program administered by the DOE that provides access for eligible DOE contractor employees or their survivors to a Physicians Panel Process. The Physicians Panel established under the EEOICPA determines the validity of claims that a current or former DOE contractor employee's illness or death arose from his or her exposure to a toxic substance during the course of his or her employment at a DOE facility.

¹ A DOE contractor is defined as follows: (a) an individual who is or was in residence at a DOE facility as a researcher for one or more periods aggregating at least 24 months; (b) an individual who is or was employed at a DOE facility by (i) an entity that contracted with DOE to provide management and operation, management and integration, or environmental remediation at the facility; or (ii) a contractor or subcontractor that provided services, including construction and maintenance, at the facility. 10 C.F.R. § 852.2.

² A DOE facility is defined as: any building, structure or premise, including the grounds upon which such building, structure, or premise is located: (a) in which operations are, or have been, conducted by, or on behalf of the DOE (except for buildings, structures, premises, grounds, or operations covered by Executive Order No. 12344 dated February 1, 1982 (42 U.S.C. § 7158 note), pertaining to Naval Nuclear Propulsion Program); and (b) with regard to which DOE has or had (i) a propriety interest; or (ii) entered into a contract with an entity to provide management and operation, management and integration, environmental remediation services, construction, or maintenance services. 10 C.F.R. § 852.2.

³ See www.eh.doe.gov/advocacy.

⁴ See Executive Order No. 13,179 (December 7, 2000).

In the case at hand, the DOE Worker Advocacy Office declined to present the applicant's application to a Physicians Panel because the office determined that the applicant did not meet the eligibility requirements for the Physicians Panel Process. *See* April 13, 2004 letter from the DOE Worker Advocacy Office to the applicant.

In the original application that he filed with the Office of Worker Advocacy, the applicant stated that he worked as a Remediation Inspector from 1981 to 1986 for Bendix and Geo-Tech at the DOE's Grand Junction Operations Office in Grand Junction, Colorado. According to the applicant, his job required him to (1) inspect properties that were being remediated and (2) ensure that all uranium mill tailings were retrieved and hauled away. He related in his application that he did not wear any protective clothing while performing his work for these two contractors. The applicant believes that the cancer from which he is currently suffering resulted from his exposure to radiation while he was employed at Bendix and Geo-Tech.

In his appeal, the applicant argues the Office of Worker Advocacy incorrectly determined that he did not work for a DOE contractor at a DOE facility. He submits that he is sure that Geo-Tech was a DOE contractor at DOE's Grand Junction, Colorado facility. For this reason, the applicant submits that he should be able to avail himself of the DOE's Physician Panel Process.

III. Analysis

As noted above, access to the DOE Physician Panel is limited to applications filed by or on behalf of a DOE contractor employee, *i.e.*, an individual who is or was employed at a DOE facility by a DOE contractor. *See* 10 C.F.R. § 852.1(b). To determine whether the worker in question was a DOE contractor employee under the applicable statute and regulations, we consulted the DOE's published facilities list set forth at 69 Fed. Reg. 51,825. On that list, Grand Junction Operations Office (Grand Junction) in Grand Junction, Colorado is listed as a "DOE" facility. We next reviewed the Office of Worker Advocacy web site for additional information. There, we learned that the Grand Junction Operations Office has operated continuously as a DOE facility since 1943.

To determine whether the applicant worked for a DOE contractor, we also consulted the Office of Worker Advocacy Website. Because the web site only listed contractors at Grand Junction for various periods between 1943 and 1971, we contacted the Office of Worker Advocacy seeking information about the identity of DOE contractors at Grand Junction for periods after 1971. We learned that Bendix Field Engineering Corporation was a prime contractor for the DOE at its Grand Junction location from July 11, 1975 to September 30, 1986. According to a document obtained from the Office of Worker Advocacy, Bendix Field Engineering Corporation engaged in remediation activities at the DOE's Grand Junction location and oversaw projects involving uranium mill tailings. That same document shows that Geo-Tech or its corporate predecessors acted as a prime contractor for DOE at the Grand Junctions location from October 1, 1986 to September 4, 1996. These companies, according to the document obtained from the Office of Worker

Advocacy, worked on various remediation projects including the disposal of uranium mill tailings and tailings-contaminated material.

Based on the documentation discussed above, we find that the applicant meets the statutory and regulatory definitions under Subpart D of the EEOICPA, *i.e.*, he worked for not one but two DOE contractors, Bendix and Geo-Tech, at a DOE facility, the Grand Junction Operations Office. Accordingly, we find that the Office of Worker Advocacy erred in deciding not to present the applicant's application to the DOE Physician Panel. We will, therefore, remand the applicant's application to the Office of Worker Advocacy for appropriate processing.

IT IS THEREFORE ORDERED THAT:

- (1) The Appeal filed in Worker Advocacy Case No. TIA-0122 be, and hereby is, granted.
- (2) The Applicant's claim is hereby remanded to the Office of Worker Advocacy.
- (3) This is a final order of the Department of Energy.

George B. Breznay
Director
Office of Hearings and Appeals

Date: October 25, 2004